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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. ...385

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, and
BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioners,

vs.

CLINCHFIELD RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 4, 1969. A timely petition for rehearing was denied on March 26, 1969.

OPINIONS BELOW.

The opinion of the District Court is reported in 278 Fed. Supp. 322 and is reprinted here as Exhibit A hereto. The opinion of the Court of Appeals is reprinted here as Exhibit B hereto.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 4, 1969. A timely petition for rehearing was denied on March 26, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

Whether Section 8 of the Railway Labor Act (45 U. S. C., § 158) requires a specific agreement to arbitrate and whether such agreement must conform to all requirements of said statute.

STATUTES INVOLVED.

The applicable provisions of the Railway Labor Act, 45 U. S. C., § 151 et seq., provide as follows:

§ 157, Arbitration-Submission of controversy to arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in Sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, that the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Manner of selecting board of arbitration

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Board of arbitration; organization; compensation; procedure—(a) Notice of selection or failure to select arbitrators

Third. Then the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings; Provided, however, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

* * *

(d) Competency of arbitrators

No arbitrator, except those chosen by the Mediation Board shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

* * *

(f) Award; disposition of original and copies

The board of arbitration shall furnish a certified copy of the award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of the award shall be filed in the office of the Interstate Commerce Commission: Provided, however, That such award shall not be

construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

* * *
* * *

§ 158. Agreement to arbitrate; form and contents; signatures and acknowledgment; revocation

The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this chapter;

(c) Shall state whether the board of arbitration is to consist of three or of six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or court of appeals of the United State, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award; Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by the board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when

acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: Provided, however, That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this chapter, deliver to such board of arbitration. May 20, 1926, c. 347, § 8, 44 Stat. 584; June 21, 1934, c. 691, § 7, 48 Stat. 1197; June 25, 1948, c. 646, § 32 (a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 159. Award and judgment thereon; effect of chapter on individual employee—Filing of award

First, The award of a board of arbitrators, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Conclusiveness of award; judgment

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds

hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Impeachment of award; grounds

Third: Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by the chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: Provided, however, That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: Providing further, That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Effect of partial invalidity of award

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall deter-

mine that a part of the award is valid, the court shall set aside the entire award: Provided, however, That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

* * *
* * *
* * *

Duty of employee to render service without consent; right to suit

Eighth. Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent. May 20, 1926, c. 347, § 9, 44 Stat. 585; June 25, 1948, c. 646, § 32 (a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

STATEMENT.

A. The Facts.

Each of the petitioners is an unincorporated association and a labor organization that engages in collective bargaining in the railroad industry. At all times here material, the petitioner Order of Railroad Conductors and Brakemen (ORC&B) was the duly certified authorized and acting collective bargaining representative of road conductors employed by the respondent and the petitioner, Brotherhood of Railroad Trainmen (BRT) was the duly certified authorized and acting collective bargaining rep-

resentative of road brakemen employed by the respondent.[1]

The respondent is a railroad with a principal office and place of business at Erwin, Tennessee and is engaged in interstate commerce in the State of Tennessee and other states. It is a "carrier" as defined in Section 1 of the Railway Labor Act [45 U. S. C., § 151] and is subject to the provisions as there set out.

The case arises out of the respondent's attempt to pool cabooses under the provisions of Article 7 of the National Pooling of Cabooses Agreement with the Brotherhood of Railroad Trainmen, of May 25, 1951 and the National Pooling of Cabooses Agreement with the Order of Railway Conductors and Brakemen of May 23, 1952. In all material respects, the pooling of cabooses provisions in both agreements are essentially the same.

The provision as it appears in both agreements reads as follows:

ARTICLE 7.

Pooling of Cabooses.

(a) The employees affected by this rule and the carriers represented by the Eastern, Western and Southeastern Carriers' Conference Committees, being desirous of cooperating in situations where train service can be improved and trains expedited by the pooling of cabooses, adopt the following:

(b) Where an individual carrier not now having the right of pooling cabooses considers it advisable to establish such pooling, appropriate committee or committees representing the employees involved and proper repre-

[1] Both Brotherhoods on January 1, 1969 merged into a single union known as the United Transportation Union (UTU).

sentatives of the carrier will conduct negotiations relating thereto.

(c) A reasonable and practical approach to the problems hereinreferred to, namely—the pooling of cabooses —requires that the carriers and the employees definitely recognize each other's fundamental rights, and where necessary, reasonable and fair arrangements should be made in the interest of both parties.

It is further agreed that:

(1) Whenever the carrier desires so to pool its cabooses, it shall give notice to the General Chairman or General Chairmen of such intention, specifying the territory and service involved, whereupon the carrier and employee representative shall, within 30 days, endeavor to agree upon any facilities that should be furnished to provide accommodations substantially equivalent to those formerly available on the cabooses and used by the employees and on appropriate arrangements for supplying and servicing such pooled cabooses.

(2) In the event the carrier and such representatives cannot so agree on the matter, any party involved may invoke the services of the National Mediation Board.

(3) If mediation fails, the parties agree that the dispute shall be submitted to arbitration under the Railway Labor Act, as amended. The decision of the Arbitration Board shall be final and binding upon both parties.

(d) This rule shall become effective August 1, 1951, except on such carriers as may elect to preserve existing rules or practices and so notify the authorized employee representatives on or before July 1, 1951.

On April 2, 1965 respondent carrier notified your petitioners of its desire to confer with them on April 6, 1965, pertaining to a matter of mutual interest and simultan-

eously notified both Brotherhood's of its intent and desire to implement the pooling of its cabooses. Due to the opposition of the Brotherhoods, the respondent on April 12, 1965 delayed its proposed date of April 16, 1965 for the implementation of the pooling of cabooses, for a period of thirty days.

The Brotherhoods notified the carrier of their continued opposition and noted the variance from the procedure outlined in Paragraph 7 (c) (1), i. e., the company's failure to give proper notice of their intention to implement the pooling of its cabooses. On May 17, 1965, the carrier gave formal notice of its intent. A subsequent meeting was arranged to discuss the implementation of the order. The Brotherhoods on May 26, 1965 jointly offered a counter-proposal which was rejected by the carrier on May 28, 1965.

The carrier on May 28th notified the Brotherhoods that it intended to proceed by invoking the services of the National Mediation Board under Article 7 (c) (2) of their national agreement, which provides that when an empasse is reached, either party may invoke the Board's services. The respective positions of the parties to the dispute was requested by the National Mediation Board, once the Board's good offices were invoked.

The Brotherhoods by letter of June 14, 1965 informed the Executive Secretary of the Mediation Board that intervention at that time by the Board would be premature and that the parties should be given an opportunity to resolve their differences through the collective bargaining process. The Board on June 21 requested the respondent carrier to resume conferences with the Brotherhoods. The Brotherhoods on July 15 submitted to the carrier a revised proposal which was rejected.

Again on July 26, 1965 the carrier wrote to the National Mediation Board requesting its services and in particular

the assignment of a mediator to conduct subsequent negotiations. A mediator was named by the Board. Conferences were held by the mediator with representatives of the carrier and brotherhoods, none of which resulted in a resolution of the difficulty.

Pursuant to Article 7 (c) (3) of the national agreements the carrier on September 8, 1965 requested the Mediation Board to establish an Arbitration Board to resolve the matter.

The carrier and Brotherhoods designated their respective representatives to the Arbitration Board and the first meeting of the Board was held on December 7, 1965. The meeting was recessed without a resolution of the differences. Thereafter the carrier on December 7, 1965 requested the National Mediation Board to appoint a neutral member. Both Brotherhoods notified the Board of their opposition to such an appointment. The text of their letters to the Board are attached hereto and marked as Exhibit C and Exhibit D. Particular attention is directed to Exhibit C, the letter of G. H. Harris, President of Order of Railway Conductors and Brakemen to the National Mediation Board, wherein he stated:

> "It is our further position that the National Mediation Board would have no authority to proceed with the appointment of an arbitrator under these circumstances pending resolution of the dispute over the meaning of Article 7, *unless there is a mutual agreement between the parties to dispute over the questions to be arbitrated.* We are definitely not agreeable to proceed with arbitration under these circumstances" (Our emphasis).

The Mediation Board on January 3, 1966 rejected the position of the Brotherhoods and advised them that a neutral arbitrator would be named and that the vehicle

to resolve this dispute had been officially classified as Arbitration Board No. 292, Case A-7432. Thereafter, the National Mediation Board appointed Mr. Bryon Abernethy as the neutral board member.

The Board No. 292 first convened on April 19, 1966 for the purpose of organization and determination as to its future course of conduct. Labor memberts at this time renewed their opposition to the Board's proceeding further until the initial question under Article 7 (a) [i. e., whether the train services could be improved and trains expedited by pooling of cabooses] had been resolved under the National Disputes Committee. The Disputes Committee having been created under Article 14 of the 1951 and 1952 pooling of cabooses agreements.

The neutral arbitrator rejected the position of the Brotherhoods and held that the Board proceed with consideration of the dispute on its merits. The Board next convened on January 4, 1967 with Brotherhood members participating only after entering into the record their position that the Board did not have jurisdiction to consider the matter. They then proceeded without waiver of any right, legal or otherwise. The award was subsequently rendered on May 3, 1967, and is marked as Exhibit E hereto.

On or about May 3, 1967, the respondent, acting through and by its representatives, and the neutral member of the Arbitration Board filed with the Clerk of the U. S. District Court for the Eastern District of Tennessee, Northeastern Division, the award and a record of the proceedings therein, purportedly in compliance with the provisions of the Railway Labor Act and particularly section 9, Second thereof (45 U. S. C., Section 9, Second).

B. **Proceedings Below.**

On May 12, 1967, the petitioners filed in the U. S. District Court for the Eastern District of Tennessee, North-

eastern Division, a petition and complaint for impeachment of the award and for declaratory judgment naming the respondent carrier as the defendant. Jurisdiction was founded generally under the Railway Labor Act (45 U. S. C., Section 151, et seq.) and particularly Section 159, Third thereof.

The Complainant alleged that the award and the proceeding therein were invalid and that the District Court lacked jurisdiction and statutory authority to enter a judgment thereon. The allegation rested upon the belief that the award plainly did not conform to the substantive requirements laid down by the Railway Labor Act, and the proceedings were not substantially in conformity with the said Act. The Complaint further alleged that the award did not conform nor confine itself to the stipulations of the agreement to arbitrate.

The carrier answered and moved to dismiss the action for want of jurisdiction, which motion was subsequently denied by the Court. The Court in its Memorandum Opinion and Order denying the Carrier's motion made note of the failure of the Arbitration Board to conform to provisions of 45 U. S. C., § 157, First and indicated that it would entertain a motion for summary judgment on this point from the Railway Brotherhoods.

Thereafter, the Brotherhoods filed their motion for summaary judgment and the Court on November 28, 1967 entered same. The respondent subsequently filed a motion for a new trial and alternative relief, which was thereafter denied by the Court on December 26, 1967.

A timely appeal was filed by the respondent. After the filing of briefs and argument the U. S. Court of Appeals for the Sixth Circuit reversed the District Court basing its decision on two points: (1) ". . . the unions waived their right to object to the statutory departure by participating in the arbitration proceedings without objection on

this point" (Op. pg. 6). (2) "While no specific agreement to arbitrate was executed, we think the collective bargaining agreement itself was such an agreement. To the extent the bargaining agreement does not meet the requirements of the Act, the variance was waived by the Unions" (Op. p. 6).

A timely petition to rehear was filed by your petitioners which was denied on March 26, 1969.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals in this case involves an important question of federal law which has not been but should be settled by this Court.

Even before the turn of the century, Congress was vitally concerned with the matter of labor disputes in the nation's railroad industry, recognizing the necessity for a comprehensive negotiation, mediation, and voluntary arbitration processes to avoid damage to the general public when labor-management relations appear to break down with resultant work stoppage. Congress, consistent with ordinary notions of fair play and freedom, introduced as early as 1888 a provision for voluntary arbitration and public investigations with respect to labor controversies in the railroad industry (25 Stat. 501).

That this matter was one of continuing concern to the Congress is evidenced by the legislative attention disputes in the railroad industry have received over the last 80 years. For from 1888 to Public Law 88-108 approved August 28, 1963, Congress gave its attention to disputes problems in the railroad industry repeatedly. See the Erdman Act of 1898, 30 Stat. 1424; the Newlands Act of 1913, 38 Stat. 103; the Railway Labor Act of 1926, 44 Stat. 577, amended in 1934, 48 Stat. 1186, in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238.

Thus the problem of a disputes settlement procedure in the railroad industry is one of grave national concern. In this litigation, the Court of Appeals for the Sixth Circuit has judicially created a major exception to the mandatory arbitration requirements of the Railway Labor Act. It has done this without reference to either the language of the statute itself or to its extensive legislative history. No other court of appeals or any state or lower court has ever heretofore held that a valid arbitration proceeding could be had under the Railway Labor Act without conformity to the substantive provisions of 45 U. S. C., § 158 which statute outlines in careful detail the requirements for an arbitration proceeding under such Act. That these requirements were not observed in the present case is uncontested nevertheless, the Court of Appeals approved this departure thereby permitting Respondent to circumvent the carefully specified procedures for negotiation, mediation and ultimately arbitration which the Act prescribes as the primary means for settling labor disputes in the railway industry.

The Court of Appeals created an exception for this carrier, as Mr. Justice Rutledge once put it, "for this day and this train only" on a wholly untenable waiver theory which we shall hereinafter advert to. In our view, there is no basis in law or policy for the exception this created. And we suggest further that this exception constitutes a potentioally serious disruptive element in railway labor relationships which could have effects well beyond the particular labor dispute here involved. For as a consequence of the Court's determination, Petitioners, who are the statutory bargaining representative for more than a quarter of a million railway workers, were held bound by an arbitration award which admittedly did not conform to the statutory requirements of the Railway Labor Act set out in 45 U. S. C., § 158, which proceedings were held in the absence of the written submission agreement man-

datorily required by the statute; without even a definition of the issue to be decided by the Arbitrator, similarly required by the statute, on the theory that by appearing to protest the jurisdiction of the Arbitration Board Petitioners "waived" their right to contest the validity of the resulting arbitration award.

Thus in effect Petitioners were subjected to an award in a proceeding which not only did not conform to the requirements of the Railway Labor Act but to the award of the tribunal whose jurisdiction was challenged from the beginning by Petitioners and which award dealt with an issue which had not been defined by the required written submission agreement mandatorily required by the Act.

We suggest that the entire arbitration proceeding comes perilously close to compulsory arbitration and is as antithetical to the mediation voluntary arbitration premises of the Railway Labor Act as day is to night.

1. The Railway Labor Act specifies in detail the procedures to be used by a carrier covered by the Act in implementing changes in existing rates of pay, rules, or working conditions of its employees covered by collective bargaining agreements.

Section 6 of the Act, 45 U. S. C., § 156 entitled, "Procedures in Changing Rates of Pay, Rules and Working Conditions", provides that the party desiring a change in conditions "shall give at least 30 days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions". Within this 30-day period preceding the change, a conference must be agreed upon between the parties to the dispute. The Act thus contemplates face-to-face negotiations prior to the implementation of any change in existing conditions of employment. If this negotiation is unsuccessful in reaching agreement

prior to the implementation of the change, the Act provides that either party to the dispute may request the services of the National Mediation Board, whereupon the National Mediation Board is required to offer its services "and promptly put itself in communication with the parties to such controversy and shall use its best efforts to bring them to agreement." (45 U. S. C., § 155, Section 5, First.) The Act continues that if the efforts of the Mediation Board "shall be unsuccessful", the Board shall at once "endeavor . . . to induce the parties to submit their controversy to arbitration **in accordance with the provisions of this statute.**" Should mediation fail, Section 10 of the Act, 45 U. S. C., § 160, provides for the creation of a Presidential Board of Review.

Here the Carrier and the Unions had entered into a collective bargaining agreement setting forth in Article VII the procedures to be followed should a Carrier desire to pool its cabooses. These procedures required the statutory 30-day notice from the Carrier of an intention to modify working conditions in respect of pooling of cabooses (Article VII (1) Collective Bargaining Contract); provided in the event of a lack of agreement between the parties for referral to the National Mediation Service; and provided, as does the Railway Labor Act, that if such mediation failed the matter would be "submitted to arbitration *under the Railway Labor Act as amended.*"

When mediation did fail, instead of referring the matter back to the Carrier and the Unions for the drafting of the arbitration submission agreement required by 45 U. S. C., § 158, the National Mediation Board appointed a "neutral member" for an arbitration board it sought to create. Petitioners promptly challenged the authority of the Mediation Board in the premises, noting the absence of a "mutual agreement" between the parties to the dispute "**over the questions to be arbitrated.**" And when the hearings before the neutral member appointed by the National

Mediation Board commenced, the Unions once again, and at their first opportunity, challenged the jurisdiction of the Board and participated under such reservation throughout the proceeding.

The Court of Appeals conceded the statutory departure but treated it in an almost cavalier manner noting only and erroneously that "the Unions waived their right to object to the statutory departure by participating in the arbitration proceedings . . ." Opinion, p. 6. Further and after conceding the absence of a "specific agreement to arbitrate," the Court of Appeals equated the collective bargaining commitment of the parties to **enter into an arbitration agreement** "under the Railway Labor Act" as, in fact, **being** "such an agreement." Incredibly the Court below added that, "to the extent the bargaining agreement does not meet the requirements of the Act, the variance was waived by the Unions" and this despite the fact **the record was clear** that the Unions objected to the jurisdiction of the National Mediation Board to constitute the Arbitration Board and thereafter to the jurisdiction of the Board itself.

Thus in a very real sense the Court of Appeals has substituted involuntary arbitration for voluntary arbitration.

The Railway Labor Act carefully provides through a series of detailed provisions for negotiation, mediation and arbitration in major disputes involving changes in rules and working conditions. And changes in rules and working conditions may be made only after the statutory procedures have been pursued or exhausted.

Here there was no pretense at compliance with the arbitration provisions of the Act. But the Court of Appeals nevertheless, and for the first time, created an exception to the Act, permitting imposed arbitration which

admittedly did not comport with such substantive provisions as a written agreement to arbitrate **defining the issue to be submitted to arbitration.**

Neither the words nor the purposes of the Act are served by such a construction. And such a determination hinders, rather than promotes, the full utilization of voluntary arbitration as a method for settling disputes in the transportation industry subject to the Railway Labor Act.

In fact, and as a direct result of the Court of Appeals' decision in this case, transportation unions would be extremely reluctant to enter into a collective bargaining agreement containing a commitment to resort to arbitration if such a commitment is to be construed as permitting arbitration procedures which are admittedly at variance with the requirements of the Railway Labor Act to the prejudice of the transportation Unions.

In any arbitration proceeding, agreement upon the question to be arbitrated is fundamental. Here there was no such agreement, despite the fact that the statute, as well as ordinary common sense, calls for such an accord. And despite this substantive departure from the clear, plain, and unambiguous language of 45 U. S. C., § 158 (e) which says that the agreement to arbitrate "shall state specifically the questions to be submitted to the said Board for decision" an award was upheld resulting from a proceeding in which no agreement to arbitrate was ever reduced to writing nor were any other provisions of 85 U. S. C. A. comported with in the arbitration proceeding and the resulting award.

This Court has previously noted that the "procedures of the Act are purposely long and drawn based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." **Brotherhood of Railway and Steamship Clerks, et al. v. Florida**

East Coast Railway Company, 384 U. S. 238, at 245. But as this Court said in the **Florida East Coast Railroad Company** case, "The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what their act requires to be done by the other orderly procedures." 384 U. S. at 248.

Here the Carrier inveighed the Mediation Service to appoint a neutral member to an arbitration board, ignoring the Union's protest that no agreement upon the question to be submitted to arbitration had been executed; the arbitration was then had without any regard for the statutory requirements respecting arbitrations set out in 45 U. S. C., § 158; and the award of the Arbitrator on the undefined questions submitted to him was sanctioned by the Court of Appeals on an estoppel theory, despite the undisputed fact that from the outset the Unions had contested the jurisdiction of the Mediation Service first and of the Arbitration Board later because of the absence of compliance with the requirements of the arbitration provisions of the Railway Labor Act, and, indeed, of the collective bargaining agreement which required any arbitration respecting the pooling of cabooses to be conducted *"under the Railway Labor Act"*, meaning in accordance with the terms thereof. And this despite the firmly established view that any agreement to arbitrate under the Railway Labor Act must strictly adhere to the essential terms of such arbitration agreement. See, e. g., **Railway & Steamship Clerks, et al. v. Norfolk, Southern Railway Company** (C. A. 4), 143 F. 2d 1015.

2. In sum, the Court of Appeals' exception of this Carrier from the clear requirements of the Railway Labor Act is patently erroneous. In our view it is important for this Court to reject the decision of the Court of Appeals, wholly unsupported by the Act, which threatens to subvert the statutory mediation and arbitration procedures

found in the Railway Labor Act. For we suggest that the decision below cannot be squared with either the commitment to enter into arbitration contained in the collective bargaining agreement or with the plain terms of the Railway Labor Act itself.

CONCLUSION.

It is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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